

Starvation As A Means Of Warfare

I. Starvation in Biafra: Moral Indignation in the West and Ambivalence in Africa, Nigeria and Biafra.

I don't know much about the relevant law. My colleagues here, who do, say that it's no insurmountable hindrance, but I don't care much about international law, Biafra or Nigeria. Babies are dying in Biafra . . .

We still have food for export. Let's get it to them any way we can, dropping it from the skies, unloading it from armed ships, blasting it in with cannons if that will work. I can't believe there is much political cost in feeding babies, but if there is let's pay it; if we are going to be hated, that's the loveliest of grounds.

Forget all the blather about international law, sovereignty and self-determination, all that abstract garbage: babies are starving to death . . .¹

Arthur Allen Leff
Associate Professor of Law
New Haven, Conn.

. . . 'starvation is a legitimate weapon of war.'²

Chief Anthony Enahoro
Federal Commissioner for Information
and Labour of Nigeria

'I want to see no Red Cross, no Caritas, no World Council of Churches, no Pope, no missionary and no U.N. delegation. I want to prevent even one Ibo having even one thing to eat before their capitulation.'³

Brig. Benjamin Adekunle
Nigerian Army

Since June 1967, the Civil War in Nigeria has surprised and horrified public opinion and diplomatic circles throughout the world. Prior to the secession of Ibo Biafra, Great Britain and the United States regarded Nigeria as a "Western showcase" which had "the makings of the most populous, most powerful, most democratic of all African nations."⁴ To the

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¹New York Times, October 4, 1968, Letter to the Editor, p. 46.

²Lloyd Garrison, *The 'Point of No Return' for the Biafrans*, The New York Times Magazine, September 8, 1968, p. 102.

³*Id.*, p. 102, as quoted from an interview in the *ECONOMIST*.

⁴*Id.*, p. 92.

disappointment of these high hopes, tribal antagonisms motivated the predominantly Ibo eastern section, now Biafra, to secede; and the present civil war "is being fought very much in the pattern of tribal wars in Africa a century ago: The winner takes all and genocide is frequently the loser's fate."⁵

On May 30, 1967, Biafra declared her independence, and no one outside Biafra itself would have predicted that the Ibo government would still exist. It is precisely because the Federal Nigerian Army has been unable to overrun the rebel forces that there has been no settlement or capitulation, and that the starvation of the civilian population, particularly children, continues and horrifies public opinion around the world.

On November 17, 1968, Senator Edward M. Kennedy dramatically underscored the situation in Biafra:

The loss of life from starvation continues at more than 10,000 persons per day—over 1,000,000 lives in recent months. Without emergency measures now, the number will climb to 25,000 per day within a month—and some 2,000,000 deaths by the end of the year. The new year will only bring greater disaster to a people caught in the passion of a fratricidal war. Crop exhaustion in combat areas will put over 8,000,000 men, women and children in the clutches of total starvation.⁶

Although public appeals on behalf of Biafra play particularly upon our moral indignation over the starvation of Biafran children as opposed to other sectors of the civilian population, this focus upon the starvation of the youngest sector is justified by the actual impact of the food shortage on the Biafran population.⁷

The reaction of western public opinion to the starvation and deaths of Biafran children appears to be moral indignation enforced by the conviction that starvation is absolutely unnecessary, despite the civil war and despite the inability of Biafran and Nigerian negotiators to agree upon the conditions under which outside relief will be allowed into Biafra. The reaction within Africa, Nigeria, and even Biafran, however, is ambivalent.

⁵*Id.*, p. 92.

⁶Release from the Office of Senator Kennedy, November 17, 1968.

⁷Lloyd Garrison reports that "All anyone can say with authority is that a whole generation of Biafrans is on the verge of being wiped out, that children under five go the fastest, that even among those youngsters who survive this war, many—if not most—will grow up intellectually stunted from malformation of the brain." Mr. Garrison further states that most of the normally healthy Biafrans between the ages of six and 50 are managing to survive despite lower resistance to pneumonia, tuberculosis, malaria, and other fatal diseases. Lloyd Garrison, *supra*, note 2, p. 84. One example of the appeals by relief organizations which emphasize the effect of the food shortage on children is that of UNICEF which was broadcast on WQXR, New York, N. Y., the Radio Station of the New York Times, as a Public Service Spot. It contained the memorable catchphrase, "Remember, when starvation begins, it is the children that die first." For a detailed technical report of the food shortages in Biafra see the remarks of Senator Charles E. Goodell incorporating *The Report of the Biafra Study Mission*, CONGRESSIONAL RECORD, vol. 115, no. 33, February 25, 1969, S1975.

Lawrence Fellows, for example, reports from Lagos that "deep resentment is gathering not only in Nigeria but elsewhere in Africa against white people of Europe and the United States who have rallied to the support of Biafra, even though most of the support has been sent on humanitarian grounds."⁸ As western public opinion becomes indignant over the starvation of babies, Lieut. Col. Odumegwo Ojukwu, the leader of Biafra, deserves credit for his diplomatic success and for his "masterful exercise in propaganda that evoked the deep sympathy of people around half the world for Biafrans—trapped and encircled by the advancing Nigerian Army and starving by the thousands."⁹

Within the African continent the moral indignation over the starvation in Biafra is not so acute. In part this may be explained simply by African resentment of European and American meddling in African affairs, albeit humanitarian, and in part by the fear that a successful Biafran quest for independence may prompt tribal minorities in other African countries to secede with the expectation of obtaining political support and material aid from Europe and the United States. But more important, perhaps, is the sociological explanation suggested by Lawrence Fellows:

Starvation and the other forms of human distress do not evoke quite the same emotions here as they do in richer, happier places. Around the Continent there are people living on the margin of starvation from the time they are born until they die . . .

In many parts of the Continent a family considers itself fortunate if half the children survive hunger and disease. In many places it is the smallest children who are allowed to slip away to starvation first when food is short.

. . . death is commonplace, and if some one in the family has to go without eating, the smallest children represent the smallest investment in food and clothes already paid.¹⁰

Certainly within Biafra starvation has not forced Lieut. Col. Odumegwo Ojukwu to capitulate despite western criticism that he is "using Biafran

⁸Lawrence Fellows, *Anger in Africa over West's Help to Biafra Rises*, New York Times, September 30, 1968, p. 12.

⁹*Id.*, p. 12. In its own publications concerning the war, the Nigerian Federal Military Government recognizes the success of Biafra's use of starvation for propaganda purposes. "But the struggle goes on and with it a new strategy; to use the starvation and sufferings of his [Colonel Ojukwu's] people as a bait for world sympathy, support and, possibly, diplomatic recognition. And a deluded world is unwittingly strengthening him in his defiance of reason and making him more and more callous in his utter disregard for the lives and miseries of his people." Graham-Douglas, Dr. Nabo B., *Ojukwu's Rebellion and World Opinion*, p. 22, distributed through the Office of the Consulate-General of the Republic of Nigeria in New York. (Emphasis is that of the original.) One example of this Biafran propaganda is a press release issued on June 26, 1968, by the New York Office of the Special Representative of the Government of the Republic of Biafra: "Biafrans would prefer to fight out their cause starving, rather than be fed by hands that also slaughter them. Biafrans would like to die as hungry, lean and neat human-beings rather than as fattened cows on an abattoir prepared by the very farmers who fattened them."

¹⁰Lawrence Fellows, *loc. cit.*, note 8, p. 12.

starvation as a political football.”¹¹ Biafra has to date accepted civilian starvation as a condition of continuing the war. While westerners may question whether it would not “be better to surrender now, while the world is still interested, and get massive relief,”¹² this does not necessarily appear to the Biafran as a realistic alternative to starvation. Hypothetically, if this war had occurred in the European context, a logical conclusion for the secessionist leaders might be that the cause was hopeless and that capitulation followed by a formal peace treaty would spare life and property. In the Biafran context, however, with the background of tribal antagonisms, the memory of the slaughter of 30,000 Ibos in the Northern Region of Nigeria in 1966, and the failure of the Nigerian régime to punish those who engaged in these mass killings, this conclusion loses some, if not all, of its logic. In addition, following Federal advances in the current war, there are reports of frequent incidents in which “thousands of Ibo male civilians were sought out and slaughtered.”¹³

Given the possibility that there may have been mass killings following Federal advances, and the fact that tales of such acts are exaggerated in the Biafran mind,¹⁴ it is not surprising that the food shortage and starvation in Biafra do not immediately dictate surrender to the Biafran mind. The reports by Mr. Garrison of his conversations with Biafrans document this:

‘Hear me, Mastah,’ says Matilda (a forty-five year old mother of a child of five whose condition of malnutrition is entering the advanced stage), spreading her hands over her stomach. ‘Even if I had a pickin’ in my belly, I would fight. We no go back for Nigeria, nevah.’ She smiles broadly. ‘I think you hear me now, Mastah.’¹⁵

‘For every Nigerian our soldiers kill, they will kill 10 of us,’ says the surveyor matter-of-factly (in a conversation with Mr. Garrison). ‘But then we know what happens, even if we don’t fight back. So why not fight, if you are going to die anyway?’¹⁶

But Sir Louis Mbanefo, Chief Justice of Biafra and judge ad hoc of the International Court of Justice, appointed by Liberia and Ethiopia as their

¹¹Lloyd Garrison, *supra* note 2, p. 90.

¹²*Id.*, p. 99.

¹³*Id.*, p. 92. The Federal Military Government has challenged the reports of civilian massacres by the Nigerian Army and invited the Governments of Canada, Poland, Sweden, and the United Kingdom, the Secretary-General of the United Nations, and the Organization of African Unity each to send a representative to Nigeria to observe the operations of the Nigerian Army in areas affected by the war. The International Observer Team has issued five interim reports, none of which have substantiated the reports of civilian massacres by the Nigerian army in the present war. “There is no evidence of any intent by the Federal troops to destroy the Ibo people or their property, and the use of the term genocide is in no way justified.” First Interim Report as quoted in Report of Special Factfinding Mission to Nigeria, February 7-20, 1969, to the Committee on Foreign Affairs, House of Representatives, March 12, 1969, 91st Cong., 1st Sess., p. 38.

¹⁴Lloyd Garrison, *supra*, note 2, p. 84.

¹⁵*Id.*, p. 99.

¹⁶*Id.*, p. 100.

representative on the recent South-West Africa Case (1966), articulates most clearly the Biafran resolve in the face of food shortages within Biafra and military superiority of the Federal Nigerian Army:

When you live with the prospect of death this long—I actually think that if and when it comes I will not be afraid. The fear is in the waiting. Death is the ultimate relief.¹⁷

But I will tell you something: we are not Little Black Sambos. We all may die, but no one may take from us the right to die in defense of our liberty.¹⁸

Thus, the civil war, the diplomatic deadlock, and the starvation continue.

* * * * *

Despite Professor Leff's moral certainty¹⁹ that international law is irrelevant to the starvation of Biafran babies, and despite the possible resignation of the Biafran population to civilian starvation as a condition of continuing their struggle, the legality of starvation of a civilian population as an instrument of war is a valid question of international law which deserves re-examination in light of the Biafran situation. One clearly cannot accept the assertions by members of the Nigerian Federal Military Government or Army that starvation is a legitimate weapon of war as conclusive of the question. Should such starvation prove illegal under international law, then Professor Leff may well be justified in his implication that the illegality of the starvation is irrelevant in face of the fact of actual starvation. If, however, the starvation in Biafra is legal under international law, and indistinguishable from the practice of nations sanctioned by international law, then we must question both the fever of our moral indignation over Biafra and the adequacy of international law.

II. The Legality of Starvation as a Means of Warfare.

A. *The Laws of Warfare.*

1. GENERAL PRINCIPLES.

Three interdependent principles, military necessity, humanity and chivalry, underlie the generally accepted rules of warfare; and it is against the background of the interaction of these three principles that the legality

¹⁷*Id.*, p. 84.

¹⁸*Id.*, p. 102. The International Observer Team reported that "The Ibo inhabitants of the war-affected areas have a real fear that they will be killed if they fall into the hands of the Federal troops," First Interim Report as quoted in Report of Special Factfinding Mission to Nigeria, loc. cit., note 13, p. 34. On August 28, 1969, Dr. Nnamdi Azikwe, an Ibo who was the first and only President of the Republic of Nigeria and the author of the Biafran national anthem, denounced the Biafran allegations that Nigeria intends to exterminate the Ibo tribe as "a cock-and-bull fairy tale" and called for a unified Nigeria. New York Times, August 29, 1969, pp. 2, 28. Whether this may start to dispel the general fear of extermination among the Ibo population in Biafra remains unclear. The Biafran government, is attempting to minimize the effect of Dr. Azikwe's defection from the Biafran cause by discrediting him within Biafra. New York Times, September 1, 1969, p. 3.

¹⁹*Supra*, note 1, p. 1.

of starvation as a method of warfare must be considered. The Basic Field Manual of the United States Department of the Army recognizes these three principles in the following language:

1. The principle of military necessity, under which, subject to the principles of humanity and chivalry, a belligerent is justified in applying any amount and any kind of force to compel the complete submission of the enemy with the least possible expenditure of time, life, and money;
2. The principle of humanity, prohibiting employment of any such kind or degree of violence as is not actually necessary for the purpose of the war; and
3. The principle of chivalry, which denounces and forbids resort to dishonorable means, expedients or conduct.²⁰

While the preamble prefacing Hague Convention IV, 1907, Laws and Customs of Warfare, implicitly²¹ recognizes the necessity of balancing these three principles in considering the legality of a specific means of warfare, the concluding passage of the preamble suggests that additional broad principles may be applicable:

Until a more complete code of the laws of war can be drawn up, the High Contracting Parties deem it expedient to declare that, in cases not covered by the rules adopted by them, the inhabitants and the belligerents remain under the protection and governance of the principles of the law of nations, derived from the usages established among civilized peoples, from the laws of humanity, and from the dictates of the public conscience.²² (emphasis added)

Whether this language providing that belligerents remain subject to "the laws of nations derived . . . from the dictates of the public conscience" would allow for the development of binding laws of nations based upon the dictates of public conscience subsequent to the ratification of the convention²³ or whether the clause is limited to laws dictated by the public conscience at the time of the convention is a question of unclear interpretation. Whether the outcry of public opinion against starvation, and in particular, the outcry against starvation in Biafra, would qualify as a "dictate of the public conscience" from which binding international law may be

²⁰U. S. War Department, Rules of Land Warfare, 1940, para. 4 (Basic Field Manual 27-10), as cited in William W. Bishop, Jr., *General Course of Public International Law*, 1965, RECUEIL DES COURS, published by the Académie de Droit International. See also M. GREENSPAN, *THE MODERN LAW OF LAND WARFARE*, pp. 313-16 and M. OPPENHEIM, *INTERNATIONAL LAW*, Vol. II, p. 227 (7th edition).

²¹GREENSPAN, p. 313.

²²This passage is known as the de Martens clause, named after its author. See GREENSPAN, pp. 6, 155.

²³At least some evidence for this view is found in W. I. HULL, *THE TWO HAGUE CONFERENCES*, p. 219. At the time of M. de Martens suggested this language at the Conference of 1899, a M. Beernaert waited with the following exclamation: "To-morrow as to-day, the rights of the conqueror, far from being infinite, will be restrained by the laws of the universal conscience, and no general will dare to infringe upon them, since that would be to place himself under the ban of civilized nations."

derived is also questionable. But at least the public expression of moral outrage, of public conscience, is recognized in Hague Convention IV as some limitation, even if only moral, upon the means of warfare.

In view of the logical difficulty of defining "starvation" as an active "means of warfare" (discussed in part II B below), it is not surprising that there is no *specific* prohibition in Hague Convention IV²⁴ of starvation as a means of warfare beyond any prohibition implicit in the general principles of military necessity, humanity, chivalry and the broad language of the preamble. Any implicit prohibition requires the delicate balance of the principle of military necessity against principles of humanity.

2. DISTINCTION BETWEEN MILITARY AND CIVILIAN POPULATION.

Such a balance of the principles of military necessity and humanity in the context of possible "starvation" involves the distinction between the armed forces and civilian population. When such a distinction is possible, the principle of military necessity would justify starvation of the combatant armed forces²⁵ while principles of humanity would prohibit the starvation of the noncombatant civilian population. Although the distinction and application of the two general principles are at least theoretically possible, in practice there is considerable doubt as to whether such a distinction can really be made:

The trend in war is to treat combatant and noncombatant alike, if to do so will realize any substantial military gain. Philosophical distinctions based on notions of humanity and a concept of war as involving a dispute between nations rather than peoples find less support the closer one gets into the fight.²⁶

The possibility of distinguishing between combatant and noncombatant

²⁴While Article 22 of the Regulations annexed to Hague Convention IV of 1907 states that "the right of belligerents to adopt means of injuring the enemy is not unlimited," none of the means specifically prohibited in Article 23 can be interpreted as specifically prohibiting starvation. Arguably Article 23(g) by which "it is especially forbidden . . . to destroy or seize the enemy's property, unless such destruction or seizure be imperatively demanded by the necessities of war" might have the effect of prohibiting seizure of foodstuffs and starvation. See discussion in part II, D, 1.

²⁵GREENSPAN, for example, states at 316-17; "In general, enemy combatants may be killed and wounded by any means except those which offend against international law. "Enemy forces may be deprived of food and water in order to compel them to surrender." U.S. War Department, Rules of Land Warfare, 1940, para. 24c (Basic Field Manual 27-10) enumerates as a specific measure justified by military necessity: 'The destruction of property, if demanded by the necessities of war; the obstruction of ways and channels of traffic, travel, or communication; and the withholding of sustenance or means of life from the enemy.' as quoted in William W. Bishop, Jr., *INTERNATIONAL LAW*, 800, (2nd ed.). Greenspan further notes at 317 that paragraph 37b of the U.S. Rules specifically states as not prohibited "measures . . . to destroy through chemical or bacterial agents harmless to man, crops intended solely for consumption by the armed forces (if that fact can be determined)."

²⁶L. Nurick, *The Distinction between Combatant and Noncombatant in the Law of War*, 39 A.J.I.L. 680 (1945).

populations in a specific war will depend upon the nature of the war. The current doubts of scholars²⁷ about the continuing validity of the distinction stem not from any theoretical weakness in it but from the changing nature of warfare. The distinction may be valid in the context of one war and invalid in the context of another:

The conditions of modern warfare have, however, greatly weakened, if they have not entirely destroyed, the rational significance of this rule. Formerly a nation was defeated and forced to yield when its relatively small armed forces in the field were overcome. But today the whole nation is in arms and the victory is won by breaking the will of the whole nation to continue the fight. Hence it has become logical to bring pressure to bear on the civilian population in order that they may induce the government to yield . . . Another consideration subjects the civilians indirectly or incidentally to the dire effects of warfare, namely the fact that practically every phase of national activity contributes to the support and success of modern war. When traffic and industrial centers are bombed, it serves a very direct and important military purpose. The incidental civilian loss and suffering is also of military advantage in that it weakens the enemy's morale. This advantage may be somewhat counter-balanced by the sentimental humanitarian objections referred to above.²⁸

The current argument that the distinction between combatant and non-combatant forces is no longer valid is based on the concept of modern war as total, in the sense that military capability is just as dependent upon the role of the civilian in the economy of a modern state at war as it is upon the soldier in uniform. Whether the distinction is valid within Biafra is a reasonable question, and it is difficult to argue that the refugee camps contribute significantly to the military effort. On the other hand it is at least arguable that food provisions ostensibly provided for refugee relief might be consumed by members of the armed forces. It also is arguable that as in the case of modern warfare so in extremely primitive warfare, the distinction between civilian population and the armed forces is not valid.

²⁷L. Nurick, *Id.*, p. 680. Oppenheim (7th ed.), Vol. II, p. 206. Ellery C. Stowell, 39 A.J.I.L. 785 (1945) H. Lauterpacht, *The Problem of the Revision of the Law of War*, BRITISH YEARBOOK OF INTERNATIONAL LAW (1952), p. 364.

²⁸Ellery C. Stowell, 39 A.J.I.L. 785 (1945). Oppenheim (7th ed.), Vol. II, pp. 207-208 examines five developments which have confused the "time-honored distinction between members of the armed forces and civilians": Growth of the number of combatants, growth of the number of noncombatants engaged in war preparations, the development of aerial warfare, economic measures, and the advent of totalitarian states. With regard to economic measures he specifically states: "To put economic pressure upon the enemy has always been legitimate; but, whereas previously it played only a secondary part, in modern warfare it has become of primary importance. The consequence is that, although war still is in the main a contention between States by their armed forces, the civilian population is no longer immune from the hardships and provocations of war." In the Draft Rules for the Limitation of the Dangers Incurred By the Civilian Population in Time of War, the International Committee of the Red Cross suggests, in Article 4, a negative definition of the term "civilian population": "For the purpose of the present rules, the civilian population consists of all persons not belonging to one or other of the following categories: (a) Members of the armed forces, or of their auxiliary or complementary organizations. (b) Persons who do not belong to the forces referred to above, but nevertheless take part in the fighting."

Whether the Biafran military organization and effort is so primitive as to justify the claim that there is no distinction between the armed and civilian population is open to question. Thus, despite the vivid contrast between a starving child in a Biafran refugee camp and an armed soldier in the Biafran army, it is at least arguable that there is no such clear distinction either between the civilian population and the combatant forces, or between the respective food supplies of these two groups, as to justify the application of the principles of humanity to prohibit the starvation of the noncombatant civilian population.²⁹

B. Relevance and Definition Difficulty of the Concept of Starvation as a Means of Warfare.

The concept of "starvation" as an active "means of warfare" has not been defined for juridical purposes³⁰ and presents obvious definitional problems. That it is at least popularly considered and spoken of as a specific means or weapon of warfare is clear from the statement of Anthony Enahoro, Federal Commissioner for Information and Labour, quoted above, that "starvation is a legitimate weapon of warfare." But, by what legal criteria can one define "starvation" as an active "means of warfare?"

Human starvation is an effect, the condition or process of perishing from insufficient food intake, a state of extreme malnutrition, which may be caused either by physical inability to eat or insufficient food supplies. Numerous factors may, as noted below, be the cause of a food shortage. Yet, despite the fact that human starvation is the effect of numerous possible causes, the noun "starvation" and the verb "to starve" are popularly and correctly used in an active, transitive sense. For the transitive verb Webster gives three distinct meanings: "to kill with hunger, to deprive of nourishment, to cause to capitulate by or as if by depriving of nourishment."³¹ If "starvation" is permitted under international law as an

²⁹In view of Lawrence Fellows' suggestion that Biafrans may make a conscious decision to deny food to children when food is short, it might be particularly difficult to distinguish between the food supplies of civilian and combatant populations. See text accompanying note 10. Dr. Clarence Clyde Ferguson, Jr., President Nixon's Special Coordinator on Relief to the Civilian Victims of the Nigerian Civil War commented on the dubious distinction between respective food supplies: "I saw no evidence of a conversion of relief supplies into military support. Although I think it is quite obvious that everybody does in fact recognize that these supplies are like bookkeeping entries, and to the extent civilians are fed with relief supplies, that relieves a certain charge of supplies for the military. It does mean that a particular resource does not have to be shared if we can substitute relief supplies." Report of the Special coordinator for Nigerian Relief, Hearing before the Subcommittee on Africa of the Committee on Foreign Affairs, House of Representatives, April 24, 1969, p. 22.

³⁰None of the popular legal dictionaries, Ballentine, Bouvier's, Black's, Jacob, or Stand's, attempts to define starvation as a legal concept.

³¹WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY.

active "means of warfare," is the meaning of the word limited to the third meaning suggested by Webster or may starvation be used "to kill with hunger" or "to deprive of nourishment" whether or not capitulation is thereby actually caused, and whether or not there is a reasonable expectation that capitulation will thereby be caused?

The attempt to define "starvation" as an active "means of warfare" meets additional difficulties. Where a country literally cannot produce sufficient food provisions, despite the allocation of available resources to food production, to prevent starvation without additional imported food, and where food imports are effectively blockaded thus causing food shortages and human starvation, it is hard to question that such a blockade constitutes "starvation" in the sense of an active "means of war." Where, however, a blockaded country is able to raise, transport, and distribute adequate food provisions among its population, but decides to allocate available resources for military purposes, food shortages and ultimately human starvation may occur among the combatant and civilian population despite the undisputed ability of the blockaded country to provide adequate food provisions for its entire population. Where the blockaded belligerent is fully able to provide adequate food to its population, it is questionable whether the blockade of foodstuffs could or should be regarded as "starvation" in the sense of an active "means of warfare" despite the fact that human starvation may occur among the population of the blockaded country.

Finally, even if the importation of food into the territory of a belligerent were effectively prevented, there would be no food shortage, let alone starvation, either among the civilian or combatant population if the blockaded country produced, transported, and distributed adequate food provisions among its population. Thus the effective blockade of the importation of foodstuffs cannot, by itself, be regarded as "starvation."

Yet food shortage and human starvation may be caused by factors other than the prevention of the importation of foodstuffs, for example, crop failure from natural causes, crop failure induced by chemical or bacteriological warfare by the belligerent, or the failure to employ sufficient resources in the agricultural sector. Even the destruction of the transportation system within the territory of a belligerent will or will not lead to food shortages and human starvation, depending on how quickly it is repaired and on the availability of local food supplies. Thus, although it may be impossible to enumerate any specific "means" of warfare (such as the blockade of the importation of foodstuffs or the destruction of the transportation system necessary to distribute foodstuffs to the belligerent population) as an act of "starvation," it is clear that under specific circum-

stances some acts may be at least popularly considered to be an active means of starving a civilian or combatant population. The difficulty of defining "starvation" as an active means of war derives from the fact that specific acts directed against a belligerent may or may not lead to food shortages and human starvation, depending upon food supplies within the belligerent territory and the allocation of resources therein under a policy decision of the belligerent leaders.

Assuming that the definitional difficulties inherent in the concept of "starvation as a means of warfare" could be overcome, it is necessary to measure the legality of "starvation" by the traditional laws of warfare.

C. Theoretical Justification of the Military Necessity of Civilian Starvation as a Means of Warfare.

Although the most recent literature justifying deliberate starvation of a civilian population in terms of military necessity grows out of the two World Wars, numerous justifications were offered in earlier wars.

France, for example, declared in 1885 during her hostilities with China, that all shipments of rice to ports north of Canton would be considered contraband of war.³² In response to the British objection that foodstuffs could not generally be treated as contraband, France justified its action "by the fact of 'the importance of rice in the feeding of the Chinese population.' Thus they implicitly claimed that articles become contraband, not by their importance in military or naval operations, but by the degree in which interference with their supply will put stress upon the noncombatant population."³³ Of the French treatment of rice as contraband, Bismarck reportedly said: "The measure in question has for its object the shortening of the war by increasing the difficulty of the enemy, and is a justifiable step in war if impartially enforced against all neutral ships."³⁴

Similarly, Bismarck's successful sieges of Metz and Paris in 1870 were accomplished partly by bombardment, but also by starvation. At that time London represented to Bismarck "that the capitulation of Paris ought to be brought about by hunger rather than bombardment."³⁵ Bismarck responded, however, by questioning whether one method was "more humane" than another, and by stating that both were "perfectly legitimate methods for overcoming the enemy and compelling him to surrender."³⁶

Considerable literature emerged from the American Civil War relevant

³²See discussion of contraband in part II, D. 3.

³³HALL, *INTERNATIONAL LAW* (8th ed.), pp. 788-89.

³⁴*Id.*, p. 780. See also GARNER, *INTERNATIONAL LAW AND THE WORLD WAR*, Vol. II, p. 337.

³⁵GARNER, *supra*, note 34, Vol. II, p. 337.

³⁶*Id.*, p. 337.

to the military utility or necessity of the starvation of a civilian population. It should, however, be noted that "the principal cause" of much of the food shortage in the Confederacy was "defective railroad transportation"³⁷ resulting both from the Confederate failure to repair breakdowns and from Union destruction of the southern railroad system. As the destruction of railroads used to transport military personnel, equipment and food is justified by the principle of military necessity, it is doubtful that a secondary effect such as a food shortage among the civilian population can be condemned by the principle of humanity. Regardless of whether the blockade of the South and the action of the Union Army were the primary causes of the food shortage in the Confederacy, both military and newspaper commentators during the war did attribute a military effect to the shortage among the civilian population; and this merits further examination.

Within the South, the blockade and the destruction of the railroad was regarded as a plan to starve the Confederacy:

Few Southerners, however, believed that the Confederacy would be starved into submission. Thus writers in the *Charleston Courier* and *De Bow's Review* maintained that 'Lincoln's humbug of a blockade' never could achieve its objective because of the South's abundant supply of food.³⁸

Although food remained abundant in some parts of the South, in others it became increasingly scarce throughout the war. Within the Confederacy, there was considerable debate about whether state legislatures should "limit the planting of cotton and tobacco and . . . require large-scale grain planting."³⁹ It was thus clearly recognized within the South that resources could be re-allocated in order to alleviate the food shortage.

As provisions became increasingly scarce, there were scattered food riots throughout the South. The most dangerous of these occurred in April 1863 in Richmond where Lee's Army had consumed most of the food, driving prices higher than elsewhere in the South.⁴⁰ Discontent because of the food shortage was not limited to civilians but extended to members of the Confederate Army, partly because the armed forces were themselves short of food and partly because of the knowledge within the military ranks of the suffering of their civilian families. "Commanders on both sides understood that men deserted because their families were suffering."⁴¹ On October 22, 1863, the *Charleston Courier* suggested "that a furlough be granted to every man in the state troops of South Carolina, most of whom

³⁷J.F. RHODES, HISTORY OF THE UNITED STATES FROM THE COMPROMISE OF 1850, Vol. V, p. 361.

³⁸PAUL W. GATES, AGRICULTURE AND THE CIVIL WAR, p. 28.

³⁹*Id.*, p. 32.

⁴⁰*Id.*, p. 39.

⁴¹*Id.*, pp. 76-77.

were farmers desperately needed at their homes to gather the corn crop, sow wheat, and prepare the households for the winter months."⁴² Obviously, military needs did not allow such a measure, but it is clear that Southerners recognized that providing the army with manpower cut down on the food supply for the civilian population. Even, as the diary of a Union volunteer suggests, the liberation of the Negro slaves was expected to have an effect on the Confederate military effort because of the food shortage. "Deprived of slave labor, the whites will be compelled to send home, or leave at home, white men enough to cultivate the land and keep their families from starving."⁴³

As the war progressed, Union troops deliberately destroyed food supplies of the South and farm machinery, in order "to weaken the South and bring the Confederacy to surrender."⁴⁴ Sherman's march through Georgia involved the confiscation and devastation of large supplies of Confederate food, and the cumulative effect of the interruption of railroad communication, the shortage of agricultural manpower, the destruction of food supplies by Union forces, and the blockade convinced some southerners that supplies were completely exhausted. In March 1865, General Robert E. Lee himself warned that "unless the men and animals can be subsisted, the army cannot be kept together, and our present lines must be abandoned."⁴⁵

It is hard to dispute the contention that the food shortage in the Confederacy, which was felt among both the civilian population and Lee's Army, was a significant factor in breaking the will of the civilian population, the soldiers, and their commanding officers to continue the war. The military effect of the food shortage was that it encouraged the South to surrender.⁴⁶

That the effect of war on the civilian population had a definite effect on the military effort of the Confederacy appears clear from an analysis of the situation within the South during the course of the war. Does, however, the possibility of an eventual military effect from civilian suffering justify the attempt of belligerents to inflict starvation and deprivation upon the civilian

⁴²*Id.*, p. 76. In a letter to Governor Vance, January 24, 1865, North Carolina farmers in Lee's Army expressed their low morale. "The soldiers said that they suffered much themselves from insufficient food and clothing and that when they were sick in the hospital, they were fed coarse and ill-prepared food; but that they could bear anything except the knowledge that their families were faced with destitution and famine." *Id.*, p. 113.

⁴³*Id.*, p. 78 quoting H.S. Ford (ed.): JOHN BEATTY MEMOIRS OF A VOLUNTEER, 1861-1865 (New York, 1946), p. 224.

⁴⁴*Id.*, pp. 92-94.

⁴⁵D.S. FREEMAN, R.E. LEE, Vol. III, p. 537. In two chapters, Freeman examines the threat of starvation in the Confederacy in particular detail. See *The Winter of Growing Despair*, Vol. III, pp. 525-45; and *The Threat of Starvation*, Vol. IV, pp. 58-73.

⁴⁶PAUL W. GATES, AGRICULTURE AND THE CIVIL WAR, p. 126.

population? It is interesting to note in this connection that General Sherman clearly thought it does:

We are not only fighting hostile armies but a hostile people, and must make old and young, rich and poor, feel the hard hand of war as well as their organized armies.⁴⁷

When Germany was faced with starvation in World War I and World War II, the blockade of foodstuffs was justified by the same concept—that there could be no distinction between the civilian and military population. Indeed, within a totalitarian state it is questionable whether such a distinction is logically possible. Certainly, during World War I, Chancellor von Bethmann-Hollweg viewed the whole civilian population as integrated into the war effort and impressed this idea upon the German people: “We at home have no other—absolutely no other—task but to produce cannon, ammunition, and food, and to distribute victuals with justice.”⁴⁸

This statement was in fact used by British polemicists to justify the blockade affecting all groups of the German population on the ground that “men and women and often children” were “as essential a part of the Empire as the soldiers in the trenches.”⁴⁹

Just as southerners in the American Civil War recognized that food shortages among the civilian population could be lessened by re-allocating military manpower to the production of food, so did those advocating “the starvation of Germany” justify this policy by pointing out that Germany had the option to reduce its war effort in order to reduce civilian deprivation and starvation:

The English are stony-hearted; they wish to limit the output of machine guns and *Flammenwerfer*; they wish to save their soldiers from the death which comes to them in countless forms. They establish a blockade: food becomes short, materials for making explosives are deficient; some one must go without—who shall it be? It cannot be the soldiers who are starved, nor will it be the cannon which go without their food. Perish rather the young and the old, aged women and helpless children. Milk at least, one would have thought, was still produced in Germany; there are the broad fields and there are the cattle: this is the staff of life for the very young. But we have forgotten—milk too can be used for manufacture of explosives; and if the babies go without their food, it is not that the import of milk into the country is checked, it is because the weak and helpless are sacrificed to the German Army.

* * *

What is wanted is not so much the land and the resources sufficient for feeding the population, but the labour which is required for this purpose. If Germany is starving, it is not the blockade of the Allies that is the sole cause of

⁴⁷B. H. LIDDELL HART, SHERMAN, p. 358.

⁴⁸New York Times, February 28, 1917.

⁴⁹J. W. HEADLAM, THE STARVATION OF GERMANY, London, 1917, p. 4.

the starvation; it is the drain on the country by the necessity of maintaining the armies in the field.⁵⁰

The policy of the blockade of Germany in World War I was simple: "to force Germany to sue for terms and to make peace." This policy makes a big assumption, however, and it is fortunate that those who advocated the active starvation of Germany were explicit about what they assumed: "This she will do [sue for peace] when it becomes apparent that it is impossible at the same time for the life of the country to be carried on and the armies in the field to be supplied with all that is necessary for them."⁵¹

The same assumption was expressed differently by Judge L. A. Atherly-Jones who warned that a blockade would not prove expedient or effective "unless it proves adequate to the extent either of (a) depriving Germany of the material necessary for effective warfare; (b) *of cutting off the supply of foodstuffs and other necessary commodities so as to render the war intolerable to her people*, or (c) by the insistent pressure of our action rendering her unequal to the task of sustaining the economic strain which the cost of war imposes."⁵²

That the civilian populations of the Confederacy in the American Civil War, and of Germany in the two World Wars, suffered from the food shortages is clear;⁵³ and that the Confederate and German governments

⁵⁰*Id.*, pp.6-7. The identical argument was made in World War II with respect to the blockade of Germany and the possibility of civilian starvation:

... the choice between underfeeding his people and underfeeding his guns. It is to this choice that the German Government are seeking to drive us; to this choice we must seek to drive them. But the final choice rests with the Government of the country concerned. If the civilian population of Germany or any part of it goes short of essential food in this war, that will be by decision of the Nazi Party, because the Government diverted so much of their total resources of man-power and foreign exchange and food-supplies to making and using munitions as to starve their own women and children. That is what the German Government did in 1914-18. The German Government of today may be expected to repeat this brutal and fatal error. But that will be their decision, not a necessary consequence of the British blockade." William Beveridge, *Blockade and the Civilian Population*, PAMPHLETS ON WORLD AFFAIRS, No. 24, New York, 1940, pp. 26-27.

⁵¹J.W. HEADLAM, *Supra*, n. 49 at 8.

⁵²Judge L.A. Altherly-Jones, K.C., *The Military Effects of Attacks on Commerce*, PROBLEMS OF THE WAR, Vol. 1, published by The Grotius Society, London, 1916, p. 13. Emphasis added.

⁵³See PAUL W. GATES, *AGRICULTURE AND THE CIVIL WAR* and A.C. BELL, *THE BLOCKADE OF GERMANY, 1914-18*, London, 1961. In Germany, the number of deaths attributed to the effects of prolonged hunger has been given as follows:

1915	88,235
1916	121,114
1917	259,627
1918	293,760

A.C. BELL, *THE BLOCKADE OF GERMANY, 1914-18*, p. 672. See also Alfred Maylander, *Food Situation in Central Europe*, 1917. U.S. Department of Labor, Bureau of Labor Statistics, Bulletin of the United States Bureau of Labor Statistics, No. 242, Washington, 1918.

eventually sued for peace, in part because of the food shortages, is probable. It is reasonable to suggest that in both cases the blockade had a "military effect" upon the will of the people and of the government to continue the wars, and that this effect may have been militarily necessary to bring the war to an end. But it is questionable whether the *eventual* military effect establishes that the *prior* blockade was militarily necessary.

If a specific course of action is totally ineffective in producing any military effect, it is even more questionable whether it can be justified on the grounds of military necessity. Must there be a sure military effect in order to justify a course of action by the principle of military necessity? The principle of humanity prohibits any "kind or degree of violence" which is not "actually necessary for the purpose of the war." This test of actual necessity suggests that there must be a sure military effect in order to justify acts of violence by the principle of military necessity.⁵⁴ In the case of the starvation of a civilian population, the military effect can only be to force the government to capitulate and to sue for peace. The military effect is thus dependent upon the validity of the assumption that the government will not tolerate mass civilian starvation as a condition of continuing the war. Consequently, the theoretical justification of the military necessity of the starvation of a civilian population as a means of warfare is that such starvation will eventually cause a government to capitulate.

But what if the government is willing to accept mass civilian starvation? Is the Biafran government willing to accept mass civilian starvation? Once the assumption breaks down, once the government of the starving population accepts human starvation as a cost of war, starvation can no longer cause capitulation; and the military effect of starvation disappears. Does the justification of military necessity also disappear? Where it is known that a belligerent will accept mass civilian starvation, does the principle of military necessity justify an active policy of starvation which will not have any military effect? Can one know that a government will accept mass

⁵⁴U.S. War Department, Rules of Land Warfare, 1940, paras. 22-23 (Basic Field Manual 27-10) also suggest that there must be a military effect in order for a specific means of warfare to be justified by the principle of military necessity:

22. The object of war is *to bring about the complete submission of the enemy* as soon as possible by means of regulated violence.
23. Military necessity justifies a resort to all the measures which are *indispensable for securing this object* and which are not forbidden by the modern laws and customs of war. (Emphasis added).

Only those acts which are effective, which in fact cause capitulation, may qualify as measures "indispensable for securing" the object of bringing about the complete submission of the enemy. Implicit in the principle of military necessity there arguably exists the requirement that there be a military effect in order for a measure to be justified by the principle of military necessity. For further discussion of the principle of military necessity see W.G. Downey, *The Law of War and Military Necessity*, 47 A.J.I.L. 251 (1953).

civilian starvation as a condition for continuing the struggle? Does one know this about the Biafran government? The response of the apologists for the blockade of Germany in the World Wars, namely that the allocation of resources within Germany is the choice of the German government, does not necessarily comply with the requirements of the principle of humanity when it is known that the civilian population will be consciously sacrificed to the war effort of the blockaded country.

Obviously the blockading power cannot know, at the initiation of a blockade, what the blockaded power will do once the civilians begin to starve. Perhaps the only *theoretical* resolution of the difficulty is to repeat the assumption that at some point civilian starvation will produce a military effect; at some point the government of the starved population will capitulate and sue for peace. Until this point is reached, however, without a necessary military effect, civilian starvation will violate the principle of humanity. Once there is capitulation, the principle of military necessity may justify the prior civilian starvation. If the crucial point of capitulation is never reached, there is no military effect, and the principle of military necessity cannot therefore justify civilian starvation. In the Biafran context, it is now doubtful that the starvation of the civilian population will ever cause capitulation, and an active policy of starvation—if such is the policy of the Nigerian government—cannot be justified by the interaction of the traditional principles of military necessity and humanity.

D. Contexts in Which the Legality of Starvation as a Means of War is Questionable.

Unfortunately, the legality of “starvation” of a civilian population as an active “means of warfare” is seldom discussed in the literature. This is not to say that the writings omit discussion of human starvation as an effect of more specific, more readily defined, means of war. But while polemicists for one side of a conflict may have sought popularly to justify starvation of the enemy population, legal writers have usually regarded human starvation only as an effect of other acts. The legal justification of human starvation has thus focused on the legality of the acts which give rise to it, and not upon the application of the principle of military necessity or the principle of humanity to the effect of these acts—human starvation.

1. DEVASTATION AND DESTRUCTION OF FOOD SUPPLIES:

Article 23(g) of The Hague Regulations of 1907 prohibits the destruction and seizure of enemy property unless such action be imperatively demanded by the necessities of war.”⁵⁵ This prohibition seems fairly to

⁵⁵See footnote 23 *supra*.

prevent one possible effect of such action—food shortage and civilian starvation if the property destroyed is food or material necessary for the production of food—unless the necessities of war “imperatively demand.” This appears to be a more rigid test than that derived from principles of military necessity and humanity, i.e. actual necessity for the purpose of the war. Where acts, other than destruction of enemy property, will also have the possible effect of civilian starvation, perhaps consistency demands that the legality of these acts also be governed by the test that they be “imperatively demanded by the necessities of war.”⁵⁶

Sherman’s devastation of the Confederacy in the American Civil War included the destruction of food supplies. Of his activities in the Shenandoah Valley alone, Sherman wrote: “I have destroyed over 2000 barns filled with wheat, and hay, and farming implements, over 70 mills filled with flour and wheat; I have driven in front of the army over 4000 head of stock, have killed and issued to troops not less than 3000 sheep.”⁵⁷

The effect of such activities inevitably created a food shortage among the civilian population in the Shenandoah Valley, or dependent upon the Shenandoah for food supplies. Spaight, however, finds these activities fully justified by the principle of military necessity, not because he sees any justifying military effect either in the consequent food shortage among civilians, or in the increased probability of desertion from the military forces, but because the food supplies were military supplies. He characterizes the valley as

a military storehouse of supplies for the Secessionists, and if the overcoming of the hostile forces demanded that its granaries and mills should be burnt and its crops destroyed, the action which Grant and Sheridan approved must be judged consonant to the usages of war. It is this consideration—the crippling of Lee’s army—which justifies the devastation and not, as some writers have thought the fact that its inhabitants were bitterly hostile to the Union Government, or that the devastation caused widespread desertion in Lee’s army (largely recruited from the Shenandoah) because ‘the duty which a man owed to his starving family proved in many cases stronger than his patriotism.’⁵⁸

Spaight specifically extends the right to destroy food supplies to the surplus of such supplies held by the non-combatant population where the enemy depends for its supplies on this surplus for its provisions. “He should, however, make some provision for the sustenance of the people whose property he destroys.”⁵⁹ With respect to the legality of destroying provisions in the hands of the civilian population, Oppenheim differs with

⁵⁶Oppenheim (7th ed.) Vol. II pp. 415-16 suggests situations which satisfy this test.

⁵⁷J.M. SPAIGHT, *WAR RIGHTS ON LAND*, p. 133.

⁵⁸*Id.*, p. 134.

⁵⁹*Id.*, p. 138.

Spaight. Even a retreating force, he says, "may not destroy provisions in the possession of private enemy inhabitants in order to prevent the enemy from making use of them in the future."⁶⁰

Thus, although there is a clear right to destroy military stores or government owned food provisions which may be used by enemy forces, there is no right, generally accepted by writers, to destroy food supplies which belong specifically to individual civilians. Where Spaight suggests that such destruction is proper, he makes the qualification that sustenance should be provided for the civilians whose food provisions are destroyed.⁶¹

In summary, while the standard of permissible devastation appears to be one of military necessity, this does not justify destruction of the food supplies of individual civilians without providing alternative food supplies.

2. SIEGE.

There is general agreement on the legality of siege and on the legality of cutting off food supplies to the besieged locality. By Oppenheim's definition, siege may involve an attempt to starve: "Siege is the surrounding and investing of an enemy locality by an armed force, cutting off those inside from all communication *for the purpose of starving them into surrender* or for the purpose of attacking the invested locality and taking it by assault."⁶² It is noteworthy that this definition of a siege, as well as the law dealing with conduct of a siege, assumes that the besieged will surrender when faced with human starvation. The definition does not read "for the purpose of killing them with hunger" but only "for the purpose of starving them into surrender." This definition of *siege* does not define starvation in the transitive sense, but seems to accept only a limited meaning of the word. In this definition, starvation presumably does not include either killing with hunger or depriving of nourishment when such action is not motivated by the purpose to cause the besieged locality to surrender, or does not actually cause capitulation. The implicit definition of starvation assumes that there will be a military effect, *i.e.*, capitulation of the besieged locality.

Nor does this definition of the word siege specify precisely what "enemy locality" may be subject to a siege. The localities mentioned in the definition of the term "assault" are specific: "intrenchments, fortifications, habitations, villages, or towns,"⁶³ and perhaps the term "enemy locality" should be limited to such places. The term, however, may be read broadly to

⁶⁰Oppenheim (7th ed.), Vol. II, p. 414.

⁶¹This, he suggests, may be accomplished through concentration camps.

⁶²Emphasis added. Oppenheim (2d ed.), Vol. II, § 155, as cited in Hyde (2d ed.), Vol. III, § 656.

⁶³*Id.*

include a larger area, perhaps even as large as Biafra, in which case the law of siege would permit prohibiting even Red Cross food supplies from reaching Biafra. According to Hyde,

A belligerent commander may lawfully lay siege to a place controlled by the enemy and endeavor by a process of isolation to cause its surrender. The propriety of attempting to reduce it by starvation is not questioned. Hence the cutting off of every source of sustenance from without is deemed legitimate. It is said that if the commander of a besieged place expels the noncombatants, in order to lessen the number of those who consume his stock of provisions, it is lawful, though an extreme measure, to drive them back, so as to hasten surrender.⁶⁴

Hence again, it is noteworthy that the propriety of starvation is unquestioned only when this involves an attempt to reduce the besieged locality or to cause its capitulation.

3. BLOCKADE AND CONTRABAND.

It is in the context of the law of blockade and contraband that there has been the most discussion of starvation of a civilian population. In the event that a belligerent is effectively blockaded, or shipments of foodstuffs to a belligerent are declared to be absolute contraband and subject to seizure and confiscation by the other belligerent, then food shortage and civilian starvation will result unless sufficient provisions are grown within the blockaded country.

Legal scholars have not, however, directly questioned the legality of starvation of a civilian population which may result from the application of the laws of contraband and blockade. Rather, their concern has been with the difficulty of reconciling the interests of a belligerent in cutting off trade with its enemy, and the interests of a neutral in continuing to trade with both belligerents. If a legal theory justifying starvation as an active means of warfare does emerge from the writings on the law of blockade and contraband, it may be characterized as the offshoot of the efforts of governments and of scholars to reconcile the interests of belligerents and those of neutrals. This has been recognized by some writers:

The laws of blockade differ from those of siege, but not in requiring greater tenderness among belligerents. The problems that arise on blockade turn, not on the claims of humanity, but on the rights of neutrals, and on the degree and form of permissible interference with their trade. The right by technically effective blockade of a country to stop ingress and egress of every kind is unquestioned.⁶⁵

⁶⁴Hyde (2d ed.), Vol. III, § 656. Emphasis added. This language was relied upon by the Nuremberg Military Tribunal in the case of *United States v. Von Leeb*, XI Trials of War Criminals 563. For substantially the same statement of the accepted law of siege see Oppenheim (7th ed.), Vol. II, § 157.

⁶⁵William Beveridge, *Blockade and the Civilian Population*, PAMPHLETS ON WORLD AFFAIRS, No. 24, p. 6.

If the law of contraband and blockade does provide a legal theory justifying civilian starvation as a means of warfare, it is to the definition of contraband and to the distinction between absolute and conditional contraband that one must look.

Grotius is generally attributed with devising the first distinction between various goods in which a belligerent may wish to trade with a neutral: "(1) those that were of use only in war, (2) those that were of no use in war, and (3) those that were useful both in war and in peace."⁶⁶ Grotius regarded trade in the first item as being prohibited contraband, trade in the second as free; but the circumstances of the war would determine whether trade in the third item, conditional contraband, could be intercepted or not. Foodstuffs have always been considered in this third category, which has led to continuous debate over whether specific circumstances justified treating food as contraband, *i.e.*, whether the foodstuffs would contribute to the war effort by provisioning the enemy forces or freeing manpower or substitute provisions.⁶⁷

Nations have not maintained consistent positions on whether foodstuffs were to be regarded as contraband. The view of any one nation has usually depended upon whether it was a belligerent or a neutral; and a belligerent in one war has not been reluctant to assert its rights as a neutral in the next. For example, after the outbreak of war with France in 1793, Great Britain claimed that international law justified treating all provisions as contraband and subject to confiscation.⁶⁸ But as a neutral in the war which broke out between Russia and Japan in 1904, Great Britain protested the Russian denunciation of foodstuffs as contraband and expressed its "great concern" that "rice and provisions" should be treated unconditionally as contraband, this being regarded "as inconsistent with the law

⁶⁶John Bassett Moore's *Contraband of War* gives an excellent summary of the development of the law of contraband. For his summary of Grotius's distinction, see PROCEEDINGS OF THE AMERICAN PHILOSOPHICAL SOCIETY, Vol. li, p. 28.

⁶⁷The Declaration of London of 1909 represented, *inter alia*, an attempt to resolve the debate over the status of foodstuffs as contraband. Although the Declaration remained unratified, it established three categories of goods which were substantially similar to the categories established by Grotius: absolute contraband, conditional contraband, and articles which could never be treated as contraband of war. Foodstuffs were characterized as conditional contraband by Article 24, and Articles 33-36 established the conditions under which conditional contraband was subject to seizure. The Declaration of London, however, did not settle the debate, and "The First World War showed that it is impossible to settle once and for all the question what articles are to be considered contraband." Oppenheim, (7th ed.), Vol. II, p. 801. Hyde gives a long discussion of the debate surrounding the status of foodstuffs as contraband. See generally pp. 2108-2123. He concludes: "In a word, the right to deal with foodstuffs as contraband must be recognized, and simultaneously that of neutrals to demand that a belligerent refrain from exercising its privilege in case of a sufficient showing as specified by general agreement, that such articles will serve no military end. In the absence of such showing, it is not unreasonable that foodstuffs consigned to belligerent territory be deemed to have a hostile destination." p. 2123.

⁶⁸MOORE, *supra* note 66, pp. 30-32.

and practice of nations.”⁶⁹ In World Wars I and II, however, Great Britain, again a belligerent, treated food destined for Germany as contraband. In World War I, for example, the British Government consciously admitted that it would no longer attempt to distinguish between food provisions for the civilian population and food provisions for the armed forces:

The reason for drawing a distinction between foodstuffs intended for the civil population and those for the armed forces or enemy Government disappears when the distinction between the civil population and the armed forces itself disappears.

In any country in which there exists such tremendous organization for war as now obtains in Germany there is no clear diversion [division] between those whom the Government is responsible for feeding and those whom it is not. Experience shows that the power to requisition will be used to the fullest extent in order to make sure that the [wants] of the military are supplied, and however much goods may be imported for civil use it is by the military that they will be consumed if military exigencies require it, especially now that the German Government have taken control of all the foodstuffs in the country.⁷⁰

With the inability to distinguish between civilian and military populations and their respective food supplies, the categorization of foodstuffs as conditional contraband became impossible.

Neutral protests against belligerent treatment of foodstuffs as contraband have generally focused on the rights of neutrals to trade with the belligerent unless such trade directly contributes to the war effort, which, neutrals assert, it is not the case with regard to foodstuffs destined for the civilian population. Rarely has the propriety of starvation of a civilian population been challenged directly by a neutral, and rarely has a neutral argued that the principle of humanity requires that neutral food shipments to the civilian population be allowed free passage in order to avoid starvation. In 1793, for example, the United States protested against the British treatment of corn, flour and meal as contraband. At that time, Mr. Jefferson as Secretary of State conceded that Great Britain might “feel the desire of starving an enemy nation,” but he added that “she can have no right of doing so at our loss, nor of making us the instrument of it.”⁷¹ Although this statement may implicitly recognize the propriety of starving an enemy when the trade and neutrality of a third nation are not prejudiced, it clearly denies the propriety of such action when the trade and neutrality of a third nation are at stake.

During World War II, the Soviet Union protested against the British

⁶⁹*Id.*, p. 35.

⁷⁰British note to the United States, February 10, 1915, as quoted in Nurick, *The Distinction between Combatant and Noncombatant in the Law of War*, 39A.J.I.L. 689 (1945).

⁷¹As quoted in MOORE, *INTERNATIONAL ARBITRATIONS*, Vol. I, p. 303.

categorization of foodstuffs as contraband. In addition to stating that the British Government had impaired the trading interests and rights of neutral countries, the Soviet note on October 25, 1939, contested the listing of foodstuffs as contraband on humanitarian grounds:

By including in its lists of war contraband such articles and goods as fuel, paper, cotton, fodder for livestock, footwear, clothing and materials for its manufacture, and even all foodstuffs—bread, meat, butter, sugar, and other foods—the British Government in fact proclaims as contraband the basic articles of mass consumption and creates the possibility of unlimited arbitrariness in classing all articles of popular consumption as contraband.

This inevitably leads to profound disorganization of the supply of necessities to the peaceful civilian population, gravely endangers the health and lives of the peaceful population, and portends innumerable calamities for the masses of the people.

It is known that the universally recognized principles of international law do not permit the air bombardment of the peaceful population, women, children, and aged people.

*On the same grounds the Soviet Government deem it not permissible to deprive the peaceful population of foodstuffs, fuel, and clothing, and thus subject children, women, and aged people and invalids to every hardship and starvation by proclaiming the goods of popular consumption as war contraband.*⁷²

This note, however, remains a rare expression of humanitarian concern by neutral nations who have usually been more concerned about the effect of the contraband status of foodstuffs on their trade than on the civilian populations of belligerents.

Apologists for the effect of the blockade of foodstuffs on the German civilian population have denied any humanitarian obligation of a blockading power toward the blockaded civilian population, at least where the blockaded government is itself able to feed the civilian population:

Unquestionably any of the belligerent nations today can make certain that the owners of useless mouths—their women and children, their sick and aged—do not starve, if they are prepared to feed these mouths, even at the cost of losing the war. To say, as the Soviet Government say, that some act of war is contrary to international law, amounts to saying that it should not be done, even if it appears to afford the last hope of victory. There is a formally admitted obligation of this kind in respect of the use of gas or of bacteriological warfare or the deliberate bombing of open towns. If there is any similar obligation in respect of the feeding of the useless mouths, the obligation rests upon the Government which can fulfil it, the Government of the blockaded country, and not on the enemy government, which has no such power. Nothing that Britain is able to do can either prevent German women and children from

⁷²As quoted in WILLIAM BEVERIDGE, *Blockade and the Civilian Population*, PAMPHLETS ON WORLD AFFAIRS, No. 24, p. 5. Emphasis added. Vol. X, pp. 798-99. It is noteworthy that this humanitarian position is consistent with that of the Soviet Delegation in the debate on Article 23 of the Civilians Convention at the Geneva Conference in 1949. See footnote 77.

being fed or secure that they are fed. That decision lies in the hands of the Nazi Party and of their Soviet friends.⁷³

This denial of any humanitarian obligation on the part of a blockading power toward the civilian population of the blockaded power rests on assumptions which must be valid in order to justify "starvation" as an active "means of warfare": that there is no distinction (or that it is impossible to distinguish) between the civilian population and the armed forces, and that if this distinction does exist then the blockaded government has the choice between feeding its civilian population and sustaining the military effort.

E. Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 1949.

1. ARTICLE 23: FREE PASSAGE OF FOODSTUFFS.

Although the Geneva Convention Relative to the Protection of Civilians, 1949, "does not deal with the methods and weapons of warfare,"⁷⁴ Part II of this Convention is designed for the "General Protection of Populations Against Certain Consequences of War," and covers "the whole of the populations of the countries in conflict."⁷⁵ The most discussed innovation of the Geneva Civilians Convention is Article 14 which envisages the establishment of "hospital and safety zones and localities so organized as to protect from the effects of war, wounded, sick and aged persons, children under fifteen, expectant mothers and mothers of children under seven." The article contains no obligation that belligerents establish safety zones but rather allows for the conclusion of agreements between belligerents for the mutual recognition of safety zones. As Kunz has pointed out, "The 'general protection' of the civilian population found no expression in rules, but only in the recommendation of 'sanitary and security zones,' which is not legally binding."⁷⁶

Article 23, however, does contain a qualified obligation of each High Contracting Party to "permit the free passage of all consignments of essential foodstuffs, clothing and tonics intended for children under fifteen, expectant mothers and maternity cases." But this obligation is conditioned upon the satisfaction of the High Contracting Party:

⁷³BEVERIDGE, *supra*, note 72, p. 31. See also II, C above, on the theoretical justification of the military necessity of civilian starvation as a means of warfare.

⁷⁴J.L. Kunz, *The Laws of War*, 50 A.J.I.L. 323 (1956).

⁷⁵Article 13 of Geneva Civilians Convention. For Convention Text and discussion see Draper, G.I.A.D., *The Red Cross Conventions*.

⁷⁶Kunz, *supra*, note 74.

That there are no reasons for fearing:

- (a) that the consignments may be diverted from their destination;
- (b) that the control may not be effective, or
- (c) that a definite advantage may accrue to the military efforts or economy of the enemy through the substitution of the above-mentioned consignments for goods which would otherwise be provided or produced by the enemy or through the release of such material, services or facilities as would otherwise be required for the production of such goods.

The Power which allows the passage of the consignments indicated in the first paragraph of this Article may make such permission conditional on the distribution to the persons benefited thereby being made under the local supervision of the Protecting Powers.

Such consignments shall be forwarded as rapidly as possible, and the Power which permits their free passage shall have the right to prescribe the technical arrangements under which such passage is allowed.⁷⁷

It is unclear from the Report of Committee III of the Diplomatic Conference of Geneva, 1949,⁷⁸ whether the final draft of Article 23 was regarded as a declaration of existing custom and practice, or as a new obligation created by the Convention. In either case, the obligation exists

⁷⁷The legislative history of Article 23 is particularly interesting. The draft proposed by the Red Cross contained an unqualified obligation to allow the passage of foodstuffs. Article 20 of the Red Cross draft proposal read:

The Contracting Parties shall allow the free passage of all consignments of medical and hospital stores intended for civilians of another Contracting Party.

They shall likewise permit the free passage of all shipments of foodstuffs, clothing and tonics intended for children under fifteen and expectant mothers. The Power which allows the passage of foodstuffs, clothing and tonics may make such permission conditional to the fact that the distribution to the persons benefited thereby is made under the supervision of the Protecting Powers, and that persons benefited perform no work of a military character.

Such shipments shall be forwarded as quickly as possible and may be checked by the Power which permits such consignment. Diplomatic Conference of Geneva, 1949, Final Record, Vol. I, p. 117.

It is interesting to contrast the reactions of the delegations of the United States and the Soviet Union to the proposed obligation to allow free passage of foodstuffs. The United States proposed an amendment which would have eliminated any obligation to allow free passage. Instead of the language of the Red Cross proposal, "The Contracting Parties shall allow the free passage of . . ." the United States proposed language which would have established no clear obligation: "the Contracting Parties shall endeavour to allow . . ." Final Record, Vol. III, p. 113.

The obligation in the final text is dependent upon "three objective conditions" which

cannot be estimated with mathematical exactitude; it has been objected that they leave too broad a margin for subjective appreciation. In particular, the Soviet Delegation considered . . . [the three conditions] "unfair" and contrary to the humanitarian purpose of the Article, since instead of an obligation, it merely provided for a uni-lateral statement. Report of Committee III to the Plenary Assembly of the Diplomatic Conference of Geneva, 1949, Final Record, Vol. 2A, p. 820. See also IV *La Convention de Genève relative à la protection des personnes en temps de guerre*, Commentaire publié sous la direction de Jean S. Pictet, pp. 192-93.

⁷⁸Final Record, Vol. 2A, p. 820.

only when a High Contracting Party "is satisfied that there is no serious reason for fearing" that conditions (a), (b) and (c) "may" or "may not" exist. This is hardly language which creates a binding obligation under international law upon a High Contracting Party, because the obligation exists only at the party's own discretion. Absent a definite legal obligation, Article 23 does represent a "clearly worded moral obligation."⁷⁹

2. ARTICLE 3: ARMED CONFLICT NOT OF AN INTERNATIONAL CHARACTER.

Whether or not Article 23 contains a legal obligation to allow the free passage of foodstuffs in a war between two contracting parties, the war in Biafra is civil war and only a "minimum" of the humanitarian norms of the Geneva Convention are binding in "the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties," according to Article 3.⁸⁰ It is thus necessary to determine whether the obligation, legal or moral, of Article 23 is incorporated into Article 3 of the Geneva Civilians Convention and what that obligation means in the context of a civil war. The general obligation of paragraph 1 of Article 3 is that "Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely . . ." Towards this end, there is an unconditional and absolute prohibition of specific

acts . . . with respect to the above mentioned persons:

- (a) violence to life and person, in particular, murder of all kinds, mutilation, cruel treatment and torture;
- (b) taking of hostages;
- (c) outrages upon personal dignity, in particular, humiliating and degrading treatment;
- (d) the passing of sentences and carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.

There is the further obligation to collect and care for the wounded and sick; and of particular relevance to starvation in Biafra, Article 3 concludes:

An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict.

⁷⁹"Letter Addressed to the Chairman of Committee III by the International Union for Child Welfare," 21 V. 1949, Diplomatic Conference of Geneva, 1949, Final Record, Vol. III, p. 103.

⁸⁰Kunz, *supra*, note 74, p. 317. Pictet has also commented that the obligations contained in Article 3 are fewer than those in the Full Text of the Geneva Civilians Convention. Commentaire, p. 43. For a discussion of Article 3, of all four of the Geneva Conventions of 1949, see Draper, *supra*, note 75, pp. 13-17.

The Parties to the conflict should further endeavor to bring into force, by means of special agreements, all or part of the other provisions of the present Convention.

The application of the preceding provisions shall not affect the legal status of the Parties to the conflict.

In the absence of a special agreement bringing Article 23 into force, any obligation to allow the free passage of foodstuffs must be found within the terms of Article 3 itself. The general obligation of *humane treatment* of the noncombatant population is broad enough to allow an interpretation that there is an obligation to allow the passage of foodstuffs. However, it is unlikely that the draftsmen of Article 3 intended to impose greater obligations on the parties to a civil war than Article 23 imposes on Contracting Parties to the Convention, and conditions (a), (b), (c), and "the right to prescribe the technical arrangements under which such passage is allowed" established in Article 23 must be incorporated into any obligation to allow the free passage of foodstuffs which might be read into the obligation of *humane treatment* imposed by Article 3. The specific acts prohibited, acts directed against individual "persons," contrast sharply with a blockade of foodstuffs which would have a general effect on the whole economy and population of a blockaded country. It is thus doubtful whether Article 3, despite the broad language calling for humane treatment, should be read as an obligation to allow the free passage of foodstuffs.

As noted above, Article 3 also provides that "an impartial humanitarian body, such as the International Committee of the Red Cross may offer its services to the Parties to the conflict." The value of the provision is to legitimate the offer to the services of an impartial humanitarian institution ("L'offre de services d'une institution humanitaire impartiale est légitimée.")⁸¹ and to prevent the consideration of such an offer as an inadmissible interference in the internal affairs of the state to which the offer is made. The reported resentment in Nigeria and elsewhere in Africa over the humanitarian relief sent to Biafra from the United States and Europe underscores the need to legitimize humanitarian efforts through an impartial body.⁸² The language of Article 3, however, creates no legal obligation on the parties to accept such an offer, no matter how humanitarian or how impartial. Commentators have, however, suggested that there is a severe moral responsibility to accept.⁸³

While Article 3 permits an impartial humanitarian body to offer its services to both Parties to the conflict, it does not specify whether one

⁸¹Pictet, *supra*, note 77, p. 47.

⁸²See text accompanying footnote 8 above.

⁸³"La Partie au conflit qui refuserait alors les offres de services charitables de l'extérieur encourrait une responsabilité morale sévère," *id.*, p. 47.

Party must consent to relief services accepted by the other Party before they may actually be rendered by the impartial humanitarian body. As noted above, Article 3 by its own language incorporates only "a minimum" of the obligations of the Geneva Convention and therefore cannot be read to impose greater obligations on a High Contracting Party in a civil war than Article 23 imposes in war with another High Contracting Party. By this analysis conditions (a), (b) and (c), and the right to prescribe technical arrangements for the passage of relief established by Article 23, would again have to be incorporated into Article 3. This analysis would not, however, prevent an impartial humanitarian body from rendering services to one Party in a civil war without the consent of the other Party where such services were not specifically covered by Article 23 or other specific articles, which, in wars between High Contracting Parties, have the effect of limiting or conditioning the freedom of impartial humanitarian bodies to render service to those who are willing to accept it.

3. APPLICATION OF THE GENEVA CIVILIANS CONVENTION TO HUMAN STARVATION IN BIAFRA.

The apparent refusal of the Federal Military Government of Nigeria to allow planes to carry food into Biafra under the auspices of the International Committee of the Red Cross,⁸⁴ has, perhaps more than any other aspect of the Biafran starvation aroused moral indignation in western public opinion which generally regards the Nigerian government as at least morally responsible for the starvation of babies and other civilians. One must question, however, whether this apparent refusal violates Articles 3 and 23 of the Geneva Convention Relative to the Protection of Civilian Persons in Time of War, whose binding effect Nigeria recognizes.⁸⁵

The International Committee of the Red Cross has actively given medical aid in both Nigeria and Biafra since early in the course of the hostilities. It was not, however, until April and May of 1968 that the ICRC made an "appeal for massive assistance in the form of foodstuffs and medical sup-

⁸⁴There is no full account of the negotiations between the Federal Military Government, the ICRC, and Biafra concerning the arrangements for relief flights, into Biafra. All sides to these negotiations have taken different positions during the course of the war, and there has been a succession of agreements which either expired by their terms or have been broken by one side or another. No effort is made here to give a full account of all negotiations and all agreements. The account which follows is taken largely from publications of the ICRC. During an interview, Mr. Moses Ihonde, Attaché for Public Information at the Consulate-General of Nigeria in New York gave a slightly different account. According to Mr. Ihonde there is a written record of the negotiations and successive agreements which is now confidential but may be released after the war.

⁸⁵The United Kingdom ratified The Geneva Civilians Convention on September 23, 1957, and at that time Nigeria was not to become independent until October 1, 1960. On June 20, 1961, Nigeria deposited with the Swiss Federal Council a declaration that it considered the Geneva Civilians Convention binding upon Nigeria. 404 UNTS 325 (1961).

plies for more than a million people who have fled the fighting areas in Nigeria and Biafra.”⁸⁶

In June 1968, the ICRC expressed its concern over the blockade of Biafra: “The ICRC issues a reminder in this respect that the Geneva Conventions, to which Nigeria is a party, make express provision for the raising of a blockade to allow the passage of consignments intended for humanitarian purposes, that is to say, for the supply of foodstuffs and medicines for women and children.”⁸⁷ At the same time, the ICRC expressed its pleasure at the fact that the Federal Military Government had informed it “that practical facilities would be granted the ICRC for the free passage of its relief consignments.”⁸⁸ Although the ICRC did not state specifically that the Geneva Conventions legally obligate the Nigerian government to raise the blockade to allow the passage of consignments intended for humanitarian purposes, the natural inference from the “reminder” of the ICRC, which made no reference to the specific provisions of Article 23, was that the Nigerian government was so obligated. It is not unfair to suggest that this statement by the ICRC, in its monthly publication, might mistakenly create in public opinion the impression that the Federal Military Government was legally obligated to allow the free passage of foodstuffs⁸⁹ whereas in fact, under Article 23, there is only a moral obligation or a legal obligation conditioned upon a highly subjective determination of fact by the Nigerian government.

In July, the ICRC reported that General Gowon, head of the Federal Military Government, had informed the ICRC Delegate-General for Africa that the Federal Military Government was still prepared to provide to the ICRC “facilities to deliver to Biafra large quantities of relief supplies

⁸⁶See monthly accounts in *INTERNATIONAL REVIEW OF THE RED CROSS*, August 1967 to present.

⁸⁷*INTERNATIONAL REVIEW OF THE RED CROSS*,

⁸⁸*Id.*, p. 299.

⁸⁹The news columnists have reported curiously little about the impact of the Geneva Convention on the ICRC relief flights into Biafra, and what references exist have been incorrect on the law embodied in the Geneva Convention. The *Spectator*, July 12, 1969, stated flatly on p. 35: “. . . under the Geneva Conventions no country may *prevent* the Red Cross from breaching a blockade in order to relieve starvation.” In *West Africa*, June 21, 1969, p. 699, there is a specific reference to Article 3: “. . . this gives the ICRC only one right to offer its services to both sides in such a conflict [a civil war]. Each is at liberty to refuse the services or to tell the ICRC to leave.

“The ICRC seems, according to expert legal opinion, to be within its right in trying to make relief arrangements with Biafra. It is allowed to try this with any side wielding *de facto* authority in an internal conflict, regardless of legal status—as it must be if it is to operate in a civil war, the essence of which is that one side contests the other’s legality.

“Biafra, but not Nigeria, agreed publicly to night relief flights. According to legal opinion, the Federal Government would, if it wished, have only a dubious right, if any, to stop the ICRC carrying out an agreement with the Biafrans for relief confined to secessionist held territory. There may be room for legal dispute on this . . .” For the opinion of the present author see Parts II E 1 and II E 2 above.

for the half a million destitute refugees.”⁹⁰ The ICRC was not, however, to be able to choose the means of transporting the relief supplies:

The Federal Government insisted that the supplies must go through the blockade by road and stated that the Enugu and Calabar landing strips would be available to the ICRC for the transport of relief goods to the place where they would be allowed through the blockade. In addition, measures would be taken to protect the lorries. General Gowon added that action on such a scale should be approved by the Biafran authorities and given corresponding facilities by them.⁹¹

Had the Biafran government agreed to this proposal and had foodstuffs passed through the proposed land corridor, it would be impossible to claim that the Nigerian government had failed to respect whatever obligation exists under Article 23. This is particularly true in view of the provision in Article 23 that “the Power which permits their free passage shall have the right to prescribe the technical arrangements under which such passage is allowed.” Prior to the decision of the Biafran government on the proposal of General Gowon, the ICRC itself approvingly expressed its “*keen interest in the initiative* of the Federal military government which has proposed the opening of a land corridor through which consignments could be organized on a very large scale.”⁹²

The Biafran government did not, however, accept General Gowon’s proposal for land corridors. On August 14, 1968, Mr. August R. Lindt, General Commissioner of the ICRC for West Africa, held a press conference in the course of which he stated that there were three possible means of transporting the relief supplies to Biafra: “a land corridor, water transport and an air bridge. He considered that the air route would be the more easily realizable if, in Biafra, the ICRC had an airfield entirely available under its control.”⁹³ While Biafra accepted this proposal, the Nigerian government did not; and on August 17, 1968, the ICRC published the following declaration:

In view of the increasing famine in Biafra and the consequential rising death rate, the International Committee of the Red Cross has obtained the Biafran authorities’ agreement to neutralize a landing strip and to place it under ICRC control for the sole purpose of forwarding relief supplies to be distributed under ICRC supervision. ICRC delegates on the spot state the air-strip is already under their control and will shortly be fit for use.

The federal military government was requested to recognize the air-strip as neutral and to authorize ICRC aircraft to make regular flights by day, but it has stated that it could not give its agreement to the operation.

The ICRC deplores the fact that the federal military government has not

⁹⁰*International Review of the Red Cross*, July, 1968, p. 356.

⁹¹*Id.*, p. 356.

⁹²*Id.*, August, 1968, pp. 399-400. Emphasis added.

⁹³*Id.*, September, 1968, p. 460.

accepted this solution to the problem of transporting relief supplies quickly to the victims in Biafran held territory. It hopes the federal military government will revise its decision. . . .

Furthermore, the ICRC appeals to the parties in conflict to come to an agreement soon on the opening up of land and waterway corridors, to permit the transport of large scale relief supplies. Its services are available to the two parties should they desire.⁹⁴

The ICRC regretted Nigeria's failure to accept its plan to transport food to Biafra despite the fact that the Nigerian government had itself suggested a land corridor, and despite the fact that Article 23 of the Geneva Civilians Convention gives the party permitting free passage "the right to prescribe the technical arrangements under which such passage is allowed." It is again noteworthy that the applicability of Article 23 to a civil war is unclear and that Article 3, dealing with "armed conflict not of an international character," specifically provides only that "an impartial humanitarian body, such as the International Committee of the Red Cross, *may* offer its services to the Parties to the conflict," not that any party is obligated to accept such an offer, nor that any party must accept the technical arrangements, such as the means of transportation deemed desirable by the ICRC. It may fairly be questioned whether, by publicly deploring the refusal of the Nigerian government to accept the Red Cross's own recommendation of an air bridge, the ICRC did not abandon its position as an "*impartial* humanitarian body" which it must remain in order even to offer its services in a civil war under Article 3.

Military strategy of both Biafra and the Federal Military Government has prevented the ICRC from obtaining permanent agreement between them on the conditions under which relief flights would be allowed into Biafra. Neither side would formally accept conditions which could compromise its military security. The ICRC has flown at night into Biafra despite the formal objection of the Federal Military Government that night flights provided cover for other planes carrying guns and ammunition.⁹⁵ Although the Nigerian airforce harassed Biafran airports, ICRC flights

⁹⁴*Id.*, September, 1968, pp. 460-61.

⁹⁵The "cover" provided by Red Cross planes for arms flights is of two types. Simultaneous use of the Biafran airports by planes carrying arms make it difficult for the Nigerian airforce to intercept arms flights without damaging Red Cross planes. There are also reports that planes carrying arms have been disguised as Red Cross planes. "I recall seeing a French plane land at Uli when I was there that was carrying arms and had what looked like Red Cross insignia on its side. I think it is important to establish that point in case anybody thinks that some of the relief ships may be harassed deliberately. There is that kind of confusion created by the military tactics on the Biafran side." Comment of Mr. Charles C. Diggs, Jr., *Report of the Special Coordinator for Nigerian Relief*, Hearing before the Subcommittee on Africa of the Committee on Foreign Affairs, House of Representatives, April 24, 1969, 91st Congress, 1st Session, p. 15.

were able to land, and as of May 19, 1969, the ICRC reported 1,834 actual landings of relief in Biafra.⁹⁶

Relations between the ICRC and the Federal Military Government deteriorated, however, throughout the summer of 1969. In late May, Swedish Count von Rosen led a small group of Swedish and Biafran pilots in a raid on the Nigerian airport at Port Harcourt and destroyed a number of Nigerian planes. While the ICRC was not itself responsible for the raid of Count von Rosen, the Swedish pilots were closely associated with the ICRC, at least in the minds of the Federal Military Government, and Dr. August Lindt, General Commissioner of the ICRC for West Africa, was declared *persona non grata* by the Nigerian government. On the night of June 5 a plane of the ICRC was shot down by a Nigerian fighter. The press in Nigeria subsequently alleged that the aircraft was carrying arms and ammunition, a charge which the ICRC denied claiming that "the aircraft's entire cargo consisted of eleven tons of rice and nothing else."⁹⁷ The ICRC suspended its relief flights on June 10, 1969, and no relief flights under the auspices of the ICRC have gone into Biafra during a summer of negotiation and deteriorating relations between the ICRC and the Federal Military Government. A few flights under the auspices of Joint Church Aid did manage to land in Biafra each night, but these were under the constant harassment of the Nigerian airforce.

On June 30, 1969, the Nigerian Government issued a statement of its intention to curtail the role of the ICRC in Nigeria and Biafra. The government statement stipulated:

The Nigerian Rehabilitation Commission would take over co-ordination [of relief], with assistance from the Nigerian Red Cross.

Relief to Biafra would be subject to control by the federal authorities.

Only people or organisations complying with Federal Government requirements would be permitted to carry out relief operations.⁹⁸

Although this statement represented a further deterioration of relations between the ICRC and the Federal Military Government, it is consistent with obligations of Nigeria under Articles 3 and 23 of the Geneva Convention Relative to the Protection of Civilian Persons in Time of War. The statement merely asserts the right of Nigeria "to prescribe the technical arrangements under which . . . passage [of relief flights] is allowed."

Mr. Marcel A. Naville, the new President of the ICRC, responded to the Nigerian government on July 1: "It is surprising that a state representing a respectable and a respected people can think that a humanitarian

⁹⁶Topical Red Cross News, Information Notes, No. 117b, May 30, 1969, p. 3.

⁹⁷International Committee of the Red Cross, Press Release, No. 992b, June 25, 1969.

⁹⁸Topical Red Cross News, Information Notes, No. 121b, July 25, 1969, p. 1.

organization can be dismissed in the same way that a faithless servant is shown the door."⁹⁹ This statement, made during the course of a press conference in Geneva, suggests that Mr. Naville regarded the role of the ICRC as considerably more active than that of "an impartial humanitarian body" which "may offer its services" to the parties of a civil war, the role for which Article 3 of the Geneva Convention specifically mentions the ICRC. On July 5, the ICRC issued a clarification of Mr. Naville's press conference:

The Nigerian Federal Government's right to entrust the co-ordination of relief operations to a National Rehabilitation Commission was never in question. Plans for such a transfer were being worked out. . . .

President Naville stated that the ICRC's relationship to donors is that of a trustee assigned to deliver relief in Nigeria and to provide for storage and distribution. This work has, moreover, been carried out in close cooperation with the Nigerian Red Cross. The ICRC has never claimed to have any other mandate."¹⁰⁰

While this clarification does recognize the right of the Nigerian government to entrust the co-ordination of relief to a Nigerian commission, the claim by the ICRC to be a "trustee assigned to deliver relief" with a "mandate" from the donors of relief confirms that the ICRC currently envisages its role to be more active than that provided for in the Geneva Convention.¹⁰¹

The difficulty facing the ICRC in the negotiations throughout July and August was to find formal conditions for relief flights into Biafra which neither Nigeria nor Biafra considered to represent military risks. The Federal Military Government objected to night flights on the grounds that they provided a cover for arms flights. Biafra objected to day flights because it needed night flights to cover the arms flights, because it feared that Nigeria might use the day flights originating in Nigeria as a cover to attack the Uli airport in Biafra, and because the statements of some Nigerian government officials about the legality of starvation as a means of warfare make Biafra unwilling to rely on flights from Nigeria.¹⁰² Nigeria insisted that inspection of relief flights by Nigerian and neutral observers take place on Nigerian soil.

Nigeria and Biafra have each frequently changed their positions on the exact conditions under which they would respectively allow and accept relief flights. The reaction of public opinion to these negotiations has been

⁹⁹New York Times, July 2, 1969, p. 12.

¹⁰⁰International Committee of the Red Cross, Press Release No. 994b, July 5, 1969.

¹⁰¹See article by John de St Jorre, *The Red Cross Fights to Survive*, *The Observer*, September 7, 1969, for account of the debate within the ICRC over its recent activism which departs from its traditional posture.

¹⁰²*The Globe and Mail* (Toronto), July 8, 1969, pp. 2, 8.

to accuse either Nigeria or Biafra, or both, of genocide through starvation because each failed to accept the conditions which the other proposed for the relief flights. Two editorials in the *Washington Post* illustrate both extremes of public opinion:

One word now describes the policy of the Nigerian military government toward secessionist Biafra: genocide. It is ugly and extreme but it is the only word which fits Nigeria's decision to stop the International Committee of the Red Cross, and the other foreign relief, from flying in food to Biafra.¹⁰³

To stave off the threat of further mass starvation, Biafra must accept the relief offered it. Starvation does not become an acceptable instrument of war merely because it is employed by a desperate leadership on its own helpless people.¹⁰⁴

In the nine days separating the appearances of these two editorials in the same newspaper, Nigeria had clarified its statement of June 30,¹⁰⁵ and the Nigerian proposal to allow daytime flights with neutral and Nigerian inspection for arms in Nigerian territory had been rejected by Biafra.

Mr. Naville sought to repair relations between the ICRC and the Federal Military Government during his visit to Lagos in mid-July. On July 13 he issued a joint press release with Chief Anthony Enahoro, Federal Commissioner for Information and Labour:

¹⁰³The Washington Post, July 2, 1969, p. A 14.

¹⁰⁴The Washington Post, July 11, 1969, p. A20. It is noteworthy that those who have supported the policy of "One Nigeria" and hope to see Biafra abandon its secession have generally placed the blame for the impasse on Biafra: "The Biafran refusal to permit daylight flights and land corridors is the primary reason that relief and rehabilitation procedures are not today as well developed in the east as they are elsewhere in the country."

"We see no justification for Biafra's continued refusal to permit daylight operations by the ICRC and JCA [Joint Church Aid] mercy missions. We have heard all the arguments and justifications for this posture, but we believe that in the light of the grave necessity such rationalizations are unconvincing. If Biafra does wish to save the lives of those verging on starvation in the area which it controls, then it must recognize the necessity of increased airlifts and the advisability of land corridors. The fear of poisoned food has to be shown as unfounded. If military and political considerations are the basis for the rejection of daylight flights and land corridors then the Biafrans must take responsibility for the consequences." Report of Special Factfinding Mission to Nigeria, February 7-20, 1969, to Committee on Foreign Affairs, House of Representatives, March 23, 1969, p. 2.

Most notably partisan, however, is the statement of Mr. Michael Stewart, British Foreign Secretary, in the House of Commons on July 7, 1969: "We must accept that, in the whole history of warfare, any nation which has been in a position to starve its enemy out has done so. As far as I know, this is the first occasion on which a Government who were in a position to do so have said, 'We are willing not to do so provided that there are conditions which ensure that our generosity is not exploited for military ends.' That is one of the massive and solid facts in the whole situation." House of Commons, Official Report, Parliamentary Debates (Hansard), vol. 786, no. 143, July 7, 1969, c. 953. Mr. Stewart went on to report agreement between representatives of the ICRC and the Federal Military Government, a report which proved to be false and was later resented by ICRC officials in Geneva. It has been suggested that Mr. Stewart's comments were "mainly designed for domestic consumption . . . to undermine criticism from both back benches of the Government's support for the federal side." The Globe and Mail (Toronto), July 10, 1969, p. 8.

¹⁰⁵See text preceding note 98 above.

The two parties will co-operate for the transfer to the National Rehabilitation Commission of relief action co-ordination in federal territory, so far entrusted to the ICRC by the Federal Military Government;

The ICRC may continue its traditional activities in co-operation with the Nigerian Red Cross;

The date of the transfer will not be known before completion of discussions between ICRC experts, the Rehabilitation Commission, and the Nigerian Red Cross;

The ICRC is prepared to consider Federal Nigerian Government proposals for the forwarding of relief to secessionist province; *it undertakes not to fly over federal territory without government authorisation*;

The Nigerian Government undertakes to guarantee the safety of the personnel in federal territory and of aircraft on humanitarian missions flying in the air-corridors assigned for that purpose;

At the request of the ICRC President, the Federal Nigerian Government authorises one liaison flight to the secessionist area to take medical supplies and relieve personnel whose contracts have expired.¹⁰⁶

In that Nigeria claims that Biafra is federal territory, the clause by which the ICRC "undertakes not to fly over federal territory without government authorisation" appears to recognize the right of the Nigerian government established by Article 23 of the Geneva Convention "to prescribe the technical arrangements under which such passage is allowed." At this point the Nigerian government insisted that inspection of relief cargoes for arms by Nigerian and neutral inspectors take place on Nigerian territory, a condition which the ICRC seems to have indirectly recognized by agreeing not to fly over federal territory without authorisation.

Relations between the ICRC and Lagos were again strained, however, when the ICRC proposed that inspection take place outside Nigerian territory. At a meeting of the heads of diplomatic missions of countries supporting the ICRC on August 5, 1969, Mr. Okoi Arikpo, Nigerian Minister of Foreign Affairs, referred specifically to Article 23 of the Geneva Convention Relative to the Protection of Civilians in Time of War to justify the Nigerian position on relief flights. He is reported to have said that the attitude of the Nigerian government would not change until it was shown that the Nigerian government was violating Article 23.¹⁰⁷

The ICRC immediately replied to Mr. Arikpo's reliance on Article 23 in a press release on August 8:

The affirmation of the Nigerian Authorities, according to which the State providing free passage has the right to fix the technical methods, is correct.

¹⁰⁶Topical Red Cross News, Information Notes, No. 121b, July 25, 1969, p. 2. Emphasis added.

¹⁰⁷CURRENT NEWS FROM AND ABOUT BIAFRA, distributed by the American Committee to Keep Biafra Alive, Inc., no. 32, August 8, 1969; CLEARING HOUSE WEEKLY NEWS BULLETIN ON NIGERIA/BIAFRA, distributed by the Clearing House for Nigeria/Biafra Information, no. 15, August 8, 1969.

However, this definition brought in conclusion of article 23 should not serve to mask the obvious general range of this article.

Article 23 gives to children under fifteen, expectant mothers and maternity cases the right to receive medicine, medical material and the necessary food to ensure their survival. This right to be given aid obliges States parties to the Fourth Convention not only to provide free passage for the forwarding of relief but also to effect this rapidly.

Consequently, the clause at the end of article 23 can not be used to prevent such relief from arriving at its destination or to delay it. In which case it would run counter to the humanitarian purpose of this article.¹⁰⁸

This interpretation of Article 23 by the ICRC is much broader than the language of Article 23 justifies.¹⁰⁹ There may be a *moral* obligation on High Contracting Parties to the Convention, but Article 23 certainly contains no *legal* obligation "not only to provide free passage for the forwarding of relief but also to effect this rapidly." In fact, the Diplomatic Conference of Geneva rejected in 1949 flat legal obligation which the ICRC then recommended and now suggests is embodied in Article 23.¹¹⁰ Furthermore, the clause at the end of Article 23 may well run counter to the humanitarian purpose of the article, but it does not run counter to the legal obligation of Article 23 which exists only when a High Contracting Party is satisfied that the pre-conditions of its own obligation exist.¹¹¹

The Nigerian interpretation of Article 23 was more fully explained in the editorial of the Lagos *Morning Post* of August 7, 1969, a newspaper which frequently reflects the viewpoint of the Nigerian government. The full text of Article 23 was printed in addition to the editorial comment. The newspaper suggested that Mr. Naville's proposal for inspection of relief flights in neutral territory outside Nigeria would be a breach of the agreement reached on his visit to Lagos in mid-July:

A brief reference to its [Article 23] message shows that binding as it is in the name of humanity to allow consignments to the other party at war it is only so obligatory if this goodwill poses no serious threat to the donor.

It goes without saying that events of the war have indicated that any uninspected relief flight to the rebel territory has been a threat to Nigerian security.

And the Convention spells out the option that consignments may be disallowed if control of passage is deemed to be ineffective in the interest of individual security.

The ICRC will not deny that Nigeria is the power that is allowing the free passage of relief consignments, to the rebels.

It is therefore preposterous of this body to take over the role of director of the technical approach to relief from this country.

¹⁰⁸International Committee of the Red Cross, Press Release, No. 1009b, August 8, 1969.

¹⁰⁹*Supra*, part, II E 1.

¹¹⁰*Supra*, note 77.

¹¹¹*Supra*, part II E 1.

If the CONVENTION is not being read upside down or ulteriorly interpreted then we should expect the ICRC to withdraw its offer and stand by the agreement reached in Lagos a couple of weeks ago."¹¹²

While the dispute between the ICRC and the Federal Military Government over the meaning of Article 23 grew out of Nigeria's insistence that inspection for arms take place in Nigeria and of the ICRC suggestion that inspection be made at the origin of the relief flights, in neutral territory outside Nigeria, the ICRC and Nigeria finally agreed in September on a compromise plan. For a trial period of three weeks daylight relief flights were to be inspected at Cotonou, Dahomey, by representatives of the ICRC, Dahomey, and Nigeria, but Nigeria would retain the right to call the planes en route to Biafra down for inspection at Lagos, a right which Nigerian officials reportedly assured the ICRC they would only rarely invoke. Biafra, however, rejected this compromise and accused the ICRC of reaching "an understanding with Nigeria which contradicted the technical details the ICRC had already worked out with Biafra."¹¹³ Biafra then cited seven technical reasons for rejecting the conditions for relief flights agreed to by Nigeria and the ICRC.

Thus, as of the time of going to press, Nigeria, Biafra, and the ICRC are still deadlocked on the conditions for forwarding relief supplies, and the human starvation within Biafra continues.

F. The Genocide Convention.

Although Nigeria has not ratified the Genocide Convention,¹¹⁴ an examination of the Convention is relevant to the question of legality of "starvation" as a "means of warfare," especially since it is popularly alleged that the Biafran war is a war of genocide.¹¹⁵

Those parties which have ratified the Convention confirm, in Article I, "that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish." Thus "starvation" as a "means of warfare" would be clearly

¹¹²The Morning Post (Lagos), August 7, 1969, p. 8.

¹¹³The New York Times, September 15, 1969, p. 13; September 16, 1969, p. 46; Press Statement by Dr. Ifegwu Eke, Commissioner for Information, Republic of Biafra, September 17, 1969, distributed by the Office of the Special Representative, Government of the Republic of Biafra, New York, N.Y.

¹¹⁴On December 9, 1948, The General Assembly of the United Nations adopted the Convention on Genocide which entered into force on January 12, 1951, among those nations which had deposited their ratifications. For the complete text of the Convention, see Res. No. 260 (III) A, U.N. General Assembly Official Records, 3rd. Sess. I, Resolutions at 174; or 45 A.J.I.L. Supp. 7 (1951).

¹¹⁵See text accompanying notes 5 and 13, *supra*.

prohibited by the Convention as a crime under international law if genocide includes "starvation."

Article II defines genocide as "any of the following acts committed with the intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

- (a) Killing members of the group;
- (b) Causing serious bodily or mental harm to members of the group;
- (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- (d) Imposing measures intended to prevent births within the group;
- (e) Forcibly transferring children of the group to another group.

Where there exists the requisite intent to destroy a group in whole or in part, "starvation" seems fairly to fall within the definition of genocide in Article IIc.

The additional substantive law of the Genocide Convention is contained in Articles III and IV. In addition to genocide itself, conspiracy, attempts to commit, direct and public incitement to commit, and complicity in, genocide are all punishable. Moreover, persons subject to punishment include constitutionally responsible rulers, public officials and private individuals.

As Nigeria has not ratified the Convention, it is not applicable in the context of the Biafran War. Yet it is noteworthy that, where ratified, genocide is prohibited as a crime under international law "whether committed in time of peace or in time of war," and that under the requisite conditions, "starvation" of a civilian population may be included within the prohibition by Article IIc. The prohibition of genocide in wartime, as well as in peacetime, deserves emphasis, as any justification of genocide by the principle of military necessity is precluded by prohibition of genocide in time of war.

III. A Definition of Starvation as a Means of Warfare Which Would Limit its Legality.

Although scholars have neither defined the concept of "starvation" as a "means of warfare" nor directly examined its theoretical justification in terms of the general principles of warfare, they conclude from examining the practices and law of siege, blockade and contraband, that the legality of "starvation" as a "means of warfare" is unquestionable:

The practice of two world wars was based on the view that no such sacrosanctity attaches to the civilian population at large as to make illegal the

effort to starve it alongside the military forces of the enemy as a means of inducing him to surrender.¹¹⁶

If he [the noncombatant] lives in a besieged locality he may legally be starved or bombed. If he lives in a country which does not grow enough food to support its population, a blockade can legally starve him to death.¹¹⁷

"Starvation" as a legal "means of warfare" may well be defined implicitly by the law and practice of siege, blockade and contraband. But implicit definitions are unclear as the two above indicate. The first implies that legal "starvation" is limited to a means of inducing the enemy to surrender, and would exclude killing from hunger or depriving of nourishment absent both purpose and effect of inducing surrender or causing capitulation. The second appears to sanction "starvation" irrespective of any such purpose or effect.

If "starvation" of a civilian population as a legal "means of warfare" is to be defined by the application of the general principles of warfare, the principles of humanity and military necessity would limit it to those acts which, by depriving a civilian population of nourishment, or by killing some civilians from hunger, actually cause, or are reasonably calculated to cause, capitulation. It would be inconsistent with the laws of war to accept, as a legal definition, either of two popular notions of starvation, namely killing with hunger or depriving of nourishment. The general principles of the laws of war require that "starvation" be defined to preclude deprivation of nourishment or killing from hunger where there is no military effect, *i.e.*, the causation of capitulation, or no reasonable expectation that there will be such a military effect.

"Starvation" as a legal "means of warfare" might be defined to preclude deprivation of nourishment or killing from hunger which did not in fact cause capitulation. This definition would require a military effect—capitulation—and would preclude the unsuccessful use of "starvation" as a means of warfare. Yet it is questionable whether the legality of a means of warfare should be determined solely by the outcome of the war.

What, it may be questioned, is added by the test of reasonable calculation that an act of starvation would cause capitulation? Such a definition would prohibit a blockade, siege, inclusion of food as contraband, or an attempt to prohibit Red Cross food deliveries, unless they were reasonably calculated to cause surrender. No longer could a belligerent attempt to justify "starvation" by claiming that the government of the starving civilian population could feed its civilian population, but chooses not to do so

¹¹⁶Lauterpacht, H., *The Problem of the Revision of the Law of War*, 1952 BRITISH YEARBOOK OF INTERNATIONAL LAW 374. Emphasis added.

¹¹⁷Nurick, 39 A.J.I.L. 696 (1945). Emphasis added.

because it has allocated available resources to military ends. This justification assumes that the government of the starved civilian population will accept civilian starvation and that therefore this means of warfare will be ineffective. The requirement that starvation be reasonably calculated to cause capitulation would obligate a blockading power to allow foodstuffs to reach a civilian population once it realizes that the government of the starving civilians accepts mass civilian starvation as a price which it is willing to pay to continue the war.

Our indignation over Biafra results not from the use of a blockade as a means of warfare, but from the fact that both the Nigerian and Biafran governments have accepted the result of the blockade: mass civilian starvation. Neither Nigeria's military forces, nor the starvation of Biafra's population, has caused Biafra to capitulate. A definition of "starvation" as a legal "means of warfare" which requires that it be reasonably calculated to cause capitulation would at some point make illegal the continuation of a blockade in the face of the acceptance of starvation by the blockaded country. If Mr. Fellows is correct in his analysis of African attitudes toward starvation,¹¹⁸ namely that it is not regarded with the moral indignation in Africa with which it is viewed in the West, then the proposed definition of "starvation" as a means of warfare would limit its use to a greater extent in Africa than it might in a European war. Where human starvation is accepted as a fact of life even in peace time, it is even less reasonable to calculate that "starvation" as a "means of warfare" will cause the government of the starved population to capitulate.

Finally, such a definition of "starvation" as a means of warfare would be consistent with the prohibitions of the Genocide Convention. Among the acts defined as genocide, Article IIc specifies "Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part." Starvation which is reasonably calculated to cause the capitulation of an enemy government in time of war would not be prohibited by the Convention. Once, however, it becomes evident that a blockaded government accepts civilian starvation as a condition of war and that active "starvation" will not, by itself, cause the government to capitulate, then the Genocide Convention would prohibit further "starvation" as a "means of warfare." When such a point is reached, continued use of "starvation" as a "means of warfare" cannot be justified on the ground that it is reasonably calculated to cause enemy capitulation. Such "starvation" can only be condemned as genocide because it falls within the prohibition of deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part.

¹¹⁸See text accompanying note 10 above.

Whether this point has been reached in the starvation of Biafra is questionable. Despite the proclamations of various Nigerian officials that starvation is a legitimate weapon of war, it is also debatable whether Nigeria has actually engaged in an active policy of starvation of the civilian population. The delicacy of the negotiations between the ICRC, Biafra, and Nigeria indicate that the answer is not obvious. Does the Nigerian rejection of conditions proposed by Biafra for the relief flights constitute an active policy of civilian starvation when Biafra rejects a Nigerian proposal of different conditions which the ICRC, an "impartial humanitarian body", has accepted? But the documented fear among Biafrans of genocide if they do capitulate, and their acceptance to date of mass civilian starvation, suggests that a policy of continued "starvation"—if such is the policy of the Federal Military Government—cannot be justified on the ground that it is reasonably calculated to cause capitulation. Under such circumstances a policy of starvation of Biafra can only be characterized as genocide.

IV. Summary

"Starvation" as a legal "means of warfare" has never been defined explicitly in the law of war. Traditional scholarship has accepted starvation of enemy populations as an effect of the generally recognized law of war concerning siege, blockade and contraband and has implicitly assumed that such practices either will cause capitulation or are reasonably intended to do so. The interaction of the principles of military necessity and of humanity would justify the "starvation" of combatant populations but not the "starvation" of non-combatant populations. The distinction between these groups and their respective food supplies is difficult, and wartime "starvation" of a civilian population has been sanctioned by legal scholars as a result of the difficulty of making these distinctions. But again, this acceptance of starvation as a means of warfare seems to be based on the implicit assumption that civilian starvation will cause the government of the starved population to capitulate and sue for peace, thereby ending the "starvation" of the civilian population. When this assumption breaks down, when the government of the starved population accepts mass starvation as a recognized cost of continuing the war, traditional views which sanction the legality of continuing starvation are inadequate.

By explicitly defining "starvation" as a legal "means of warfare" only when it causes, or is reasonably calculated to cause capitulation, international law could adequately deal with "starvation" in the Biafran war without rejecting traditional views. Such an explicit definition would be entirely consistent with the Genocide Convention because, unless the "starvation" of a civilian population causes capitulation or is reasonably calculated to do so, it is genocide.